92-883

No.

In The

Supreme Court of the United States

October Term, 1992

CHARLES E. BERRY,

Petitioner,

vs.

A. DOE, J. DOE, HOSANA A. HUCK, MARIANNE McKINLEY, REBECCA PRICE, and NANCY CRAWFORD and MELISSA WALKER as Representative Parties on Behalf of a Definable Class,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Do allegations by an African-American of violations of his rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Ku Klux Klan Act, 42 U.S.C. § 1985(3), invoke laws providing for equal civil rights for purposes of removal under the Civil Rights Removal Act, 28 U.S.C. § 1443(1)?

II. Does a pattern of racially-motivated actions which amount to the economic lynching of an African-American during the course of a bad faith criminal prosecution interrelated with multiple punitive damages cases form a basis for invocation of the Civil Rights Removal Act, 28 U.S.C. § 1443(1)?

LIST OF ALL PARTIES

Charles E. Berry

Berry Communications Systems, Inc.

Francine Gillium

Theresa Yvonne Schmitt

"A. Doe"

"J. Doe"

Rebecca Price

Hosana Huck

Marianne McKinley

Sharissa Kistner

Shannon Meeker

Nancy Crawford

Melissa Walker

Ann Feagan

Janice Butler

Sandra Jo Kessler

Bridgett Pogrelis

Bonnie Norton

Lucille Salyers

Rebecca Heil

Freedom Meeker

Tammy Lipp

Shirley Riker

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Petitioner Charles E. Berry prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit which affirmed orders granting motions to remand in five civil damages lawsuits removed to federal district court pursuant to the Civil Rights Removal Act, 28 U.S.C. § 1443(1).

OPINIONS BELOW

The Order of the Eighth Circuit denying the petition for *en banc* disposition appears at Appendix A, *infra.* The *per curiam* Opinion of the Eighth Circuit affirming the remand of the five punitive damages cases from the St. Charles County, Missouri Circuit Court consolidated for appeal, appears at Appendix B, *infra.* The Orders and Opinions of the United States District Court for the Eastern District of Missouri in each of the removed cases appear at Appendix C, *infra.*

STATEMENT OF JURISDICTION

The Opinion of the Eighth Circuit was filed on June 30, 1992. The Petition for *en banc* disposition was overruled by the Eighth Circuit on August 20, 1992. This Petition for Certiorari was filed with the Court no later than ninety days from the date of denial of the Petition for *en banc* disposition by the Eighth Circuit. Jurisdiction over this Petition is conferred on the Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

See Appendix D, *infra,* for applicable portions of Section One of the Fourteenth Amendment to the United States Constitution, 28 U.S.C. § 1443(1), and 42 U.S.C. § 1985(3).

STATEMENT OF THE CASE

Before the Court is this clearest instance imaginable of a racially-motivated misuse of state civil judicial procedures and criminal prosecuting authority by private litigants and their attorneys working in concert with state actors. The ultimate goal of their combination and conspiracy is to achieve the financial destruction tantamount to an economic lynching of a uniquely American cultural icon. Petitioner can be saved from that lynching only if he is afforded the protections of a federal forum in which to defend himself against the racially charged tort claims hanging over his future.

Petitioner, popularly known as Chuck Berry, is an African-American singer of world renown. He removed to the district court five punitive damages/personal injury cases comprising 800-plus claims of alleged invasion of privacy (and one "interpleader" suit) in which his constitutional rights were persistently trampled. Petitioner alleged in his Notices of Removal (which incorporated his federal civil rights complaint) that the combined forces of St. Charles County, Missouri prosecuting and state court authorities acting with civil litigants and their lawyers deprived him of his right to equal protection of the laws as guaranteed by the Fourteenth Amendment and the Ku Klux Klan Act.

Their illegal ends to deny Berry's rights were achieved to a distressing degree by having Berry's estate raided in violation of the Fourth and Fourteenth Amendments on bogus drug-trafficking charges; by unconstitutionally charging him with three spurious counts on felony "child abuse"; by holding televised police and prosecutorial press conferences which defamed Berry and tainted potential jurors and the court system through false accusations of drug trafficking and child pornography; and by prosecuting civil suits in a forum which systematically made fundamentally unfair rulings against Berry while state court judges refused to equally

apply the laws for no plausible reason other than the race of Petitioner and his flouting of racial taboos.

The personal injury claims almost exclusively seek awards of punitive damages against Petitioners by jurors drawn from the overwhelmingly white jury pool in St. Charles County. Depositions of most "representative" plaintiffs in the purported "class action" removed, *Crawford v. Berry,* revealed virtually no actual damages, — *i.e.*, no losses of wages, no expenditures for medical treatment of the alleged injuries, and no demonstrable traumas.

The hundreds of plaintiffs in the removed cases are all Caucasian women who allege they were videotaped by Petitioner while using bathroom facilities. They claim the videotaping took place at Southern Aire Restaurant and Petitioner's estate known as "Berry Park", both located in St. Charles County, Missouri. Petitioner Berry denies all responsibility and liability for the videotaping, as does his Caucasian business manager, Francine Gillium, who joined in the removals.

Berry removed all the St. Charles County civil cases to the district court under the Civil Rights Removal Statute, 28 U.S.C. § 1443(1). The gist of his removal allegations was that the personal injury, punitive damages cases were rigged against him because of his race and relative wealth. After briefing of motions to remand filed by the tort claimants, but with no hearing to permit Berry to put on evidence proving his constitutional claims, the district court remanded all six cases solely upon the pleadings. Thus, this Petition presents the novel question of law whether a "racially-motivated economic lynching" in the civil and criminal proceedings against Petitioner in St. Charles County in violation of 42 U.S.C. § 1985(3) and the Equal Protection Clause suffice to state a basis for removal under § 1443(1).

The pattern of racially discriminatory unfair conduct against Petitioner Berry began in 1989 with the actions of one Vincent Huck.[1] In his role as a part-time informer, Huck participated in and directed several illegal searches of private, locked buildings or residences at Berry Park tantamount to officially-sanctioned burglary. Berry alleged on removal that, in committing those burglaries, Mr. Huck acted in conspiracy with and under the direction of attorneys in the removed punitive damages cases against Berry and under a *de facto* grant of immunity from prosecution by the then-St. Charles County Prosecuting Attorney and other St. Charles County law enforcement officials.

Vincent Huck shared some of the fruits of these unauthorized seizures with the attorneys for personal injury claimants. Those attorneys therefore embarked on a concerted plan to deprive Berry of the equal protection of the laws through coordinated efforts to enrich themselves at his expense by inflaming racial animus toward him.

During said burglaries Huck also "seized" under color of state law, while acting for then-prosecutor Hannah and St. Charles police officials, certain personal photographs of Berry, as well as videotape cassettes which the Prosecuting Attorney and police authorities permitted Huck to convert to his own use and to share with the personal injury claimants' attorneys. Huck and at least one civil damages class action (*Crawford v. Berry*) attorney, Ronald Boggs (another former St. Charles County Prosecuting Attorney), then entered into illicit negotiations with video distributors,

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1. A good portion of the factual account of the events leading up to removal to federal court of the five punitive damages cases and the interpleader case are recited in the Notices of Removal which incorporated by reference the allegations appearing in the original civil rights Complaint styled *Berry, et al. v. Boggs, et al.*, No. 91-1586(C)-2, pending in the Eastern District of Missouri. The remainder is drawn from discovery conducted in that case.

writers and publishers in Western Europe and throughout the United States in an effort to capitalize upon Mr. Berry's celebrity as an entertainer.

Plaintiffs' counsel in *Huck v. Berry,* removed to and remanded from federal court, meanwhile conspired with Huck and Huck's wife Hosana (the first personal injury plaintiff) and Boggs to deprive Petitioner of the equal protection of the laws by threatening Berry with filing lawsuits and seeking his criminal prosecution on racially inflammatory spurious charges of child pornography if Berry did not pay $10 million as ostensible "damages".

Acting in concert to deny Petitioner the equal protection of the laws, and to damage him in his person and property, certain attorneys with Vincent Huck as their "legal investigators" and Hosana Huck agreed to capitalize upon Berry's racial minority status with lurid allegations of inter-racial "peeping" and other inter-racial sexual titillation by filing with great fanfare *Hosana Huck, et al. v. Berry* when Petitioner rejected the blackmail attempts.

In furtherance of their conspiracy to assist the personal injury claimants against Mr. Berry, then-Prosecuting Attorney Hannah applied on June 23, 1990 for a search warrant to search Mr. Berry's living quarters, offices, studio and other structures located at Berry Park. Its basis was an outrageously false affidavit, lacking in probable cause, sworn by William G. Bowman, a Sheriff's Deputy in St. Charles County and a defendant in Petitioner's civil rights complaint. His affidavit detailed the incredible claims of supposedly "reliable, confidential informants" — at least two of whom were none other than Vincent Huck, with his readily apparent motives to disparage Mr. Berry.

That same day the St. Charles County anti-drug unit and

Sheriff "raided" the Berry Park estate without Mr. Berry's knowledge or consent. In the search the authorities caused extensive damage to the walls of certain structures at Berry Park. The authorities seized various items of Petitioner's personal property including several books and currency totalling $123,000, of which $122,501 was eventually returned and $499 disappeared. The St. Charles County authorities found absolutely no cocaine on Mr. Berry's property. Nor did they find any evidence that he had ever engaged in cocaine trafficking.

On June 27, 1990 the St. Peters, Missouri police chief (in St. Charles County) and chairman of the anti-drug unit disseminated to the press details of said "raid", despite the fact that no charges had been filed against Petitioner up to that time. He falsely advised the press that the authorities had found a "supply of narcotics" and that so-called "drug records" were seized from Mr. Berry's property. His accusations made specific reference to claims (already known to be false) that Petitioner was involved in trafficking "multi-kilogram quantities of cocaine". That press conference was held solely for the purpose of inflaming the population and judiciary of St. Charles County against Petitioner.

On the very day of the police chief's press conference, the *Crawford* class action case was filed amid great publicity in the St. Charles County Circuit Court by unnamed "representative parties" as plaintiffs against Mr. Berry. The day that case was filed, the plaintiffs obtained *ex parte* an order sealing their identities, and Petitioner did not learn who were his accusers until nearly one year later. Petitioner alleged on removal that such procedure violated his rights to equal protection and due process since he had no knowledge of his accusers or the nature of their claims.

The day after the class action suit was filed then-Prosecuting Attorney Hannah called a press conference at his office in which he gave an "account" of the "raid" on Mr. Berry's estate. Still, no

criminal charges had been filed. Hannah related that the authorities were "looking for" cocaine on Mr. Berry's property: "Cocaine was of course one of the major items we were looking for, and yes, as in many times when you conduct a search, you don't find everything that is listed in your affidavit". Hannah thus fostered the false impression among the local voting public and the potential jury pool that Petitioner dealt in and kept cocaine, but had successfully eluded the search. Hannah then released to the press the same bogus search warrant affidavit already known to be baseless. By another press report of the Hannah news conference, St. Charles County authorities claimed they had seized "pornographic tapes" which allegedly displayed underaged women "using" the restroom. On removal Petitioner alleged that these statements also deprived him of equal protection of the laws in violation of the Fourteenth Amendment and § 1985(3).

On July 19, 1990 Hannah filed criminal charges against Mr. Berry, three felony counts of "child abuse" of white minor children and one felony count for alleged possession of over 35 grams of marijuana. The charges were filed only after repeated consultations among Hannah and the civil rights action defendants, who had significant racial, financial and political motives and interests in initiating and continuing that baseless prosecution of petitioner Berry. The "child abuse" charges made pursuant to Mo. Rev. Stat. § 568.060 asserted tht Berry was guilty of photographing or filming white children less than seventeen years old "engaging in a prohibited sexual act . . .". Petitioner alleged these charges violated his First Amendment freedoms and right to equal protection.

During the course of the criminal prosecution, a St. Charles County Assistant Prosecuting Attorney charged with building a criminal case against Berry, said to Sheriff's deputies about Mr. Berry, "One way or another we are going to get that nigger!". Petitioner alleged on removal that this statement by the lead

prosecutor on his case made manifest that his criminal prosecution was not undertaken in good faith but was rather motivated by racial bias, and that bad faith was borne out by the authorities' actions in pursuing those charges. The felony child abuse charges were dropped by the St. Charles County Prosecuting Attorney in the state court after Petitioner Berry filed his first federal civil rights action (against Prosecutor Hannah only) since dismissed voluntarily.

The first civil case filed in St. Charles County and later removed to federal court was *Hosana Huck, et al. v. Charles E. Berry, et al.* Petitioner filed a motion to dismiss the claims of the plaintiffs on the basis of workers' compensation preemption. Under Missouri law, that was the exclusive remedy available to the women allegedly videotaped using the restrooms in the course of their employment at the Southern Aire restaurant. That crucial motion, which should have barred substantially all the punitive and other damages claims against Berry, was denied by a St. Charles County Circuit Court judge who then had maintained a 17-year romantic relationship with a plaintiff in the related "class-action" case against Petitioner, *Crawford v. Berry.* Petitioner alleged that violated his right to a fair tribunal and to equal protection of the laws.

In *Huck*, Petitioner later sought to join as a party defendant on his counter-claim for invasion of privacy and conversion of personal property the attorney for Hosana Huck, Thomas Jones. Without precedent in Missouri law Circuit Judge Donald Dalton ruled that, as a condition precedent to joining Jones, Mr. Berry must first present a *prima facie* case showing liability at an evidentiary hearing. Petitioner claimed on removal that procedure violated his right to equal protection of the laws. At the time of that ruling, Judge Donald Dalton was required by Rule 51.07 Mo. R. Civ. P. to disqualify himself from any cases against Mr. Berry since he had a blood relation to one of the attorneys for some of the "class action" plaintiffs.

Because of that onerous condtion, Mr. Berry withdrew his motion to join Jones as a counter-claim defendant and filed a separate lawsuit against him and Hosana Huck. Circuit Judge William Lohmar then dismissed Berry's claims against Jones for alleged failure to answer interrogatories sufficiently, when Berry had answered the interrogatories by referring to his testimony given in the course of a two-day deposition taken shortly before. Judge Lohmar denied reconsideration.

Circuit Judge Lohmar then denied Mr. Berry's motion to disqualify him for "bias and prejudice" arising from Judge Lohmar's role in the criminal case against Mr. Berry, as well as that Judge's denial of Mr. Berry's motion to reconsider his sanction order, and the order imposing that sanction. Judge Lohmar had chosen to believe the Huck-Bowman affidavit and had signed the warrant to search Berry Park extensively for cocaine (of course, none was found) at the time of the "raid". A few months later, however, in the *Crawford* class action suit – directly related to the *Berry v. Huck and Jones* case – Judge Lohmar recognized that he was required to disqualify himself for "cause".

On March 8, 1991, Circuit Judge Donald Dalton imposed a large monetary sanction against Mr. Berry and his attorney because of defendant Huck's "inability" to take the deposition of one Theresa Y. Schmitt in *Berry v. Huck and Jones*. At her deposition Ms. Schmitt (then not represented by counsel) asserted her Fifth Amendment privilege and refused to answer various questions about the videotapes in question. Neither Petitioner nor his counsel played any role in Ms. Schmitt's assertion of Fifth Amendment rights. That sanction also was imposed by a judge who should have disqualified himself from ruling in the case because of his blood relationship to some of the attorneys suing Petitioner.

In *Berry v. Huck and Jones*, Judge Lohmar granted, *ex parte*, defendant Jones' motion to certify as "final and appealable" the

"sanction" dismissing Jones from the litigation. Mr. Berry was not provided notice of that order. This was alleged on removal to be a clear violation of Mr. Berry's rights which deprived him of his right to file an appeal because appeal would be untimely under Missouri law. Counsel for Petitioner did not discover the existence of the order dated April 3, 1991 (handwritten on a copy of Jones' motion to certify, and without any indication that it was mailed to counsel) until July 15, 1991 while reviewing the court file in St. Charles County in preparation for filing the pending federal civil rights action of *Berry v. Boggs, et al.*

On April 19, 1991 in the *Crawford* "class-action", Judge David Dalton ordered that a $5,000 monetary sanction be imposed against Petitioner and his counsel because Mr. Berry "failed" to appear for a unilaterally-scheduled video deposition. But Mr. Berry had filed a motion for protective order before the scheduled time for the deposition, in compliance with the Missouri Rules of Civil Procedure, because of an ongoing, disfiguring course of oral surgery. Just seven days after he ordered that sanction, Judge David Dalton recognized that he, too, should have disqualified himself because of his blood relationship with an attorney for some of the class action plaintiffs. However, the judge refused to reconsider his order imposing sanctions even though his order should not have been entered and was void.

Ten months after filing the case the attorney for the *Crawford* "class action" litigants, their attorney Ronald Boggs for the first time provided notice to Petitioner's attorneys that some of the putative class members were represented by a lawyer related by blood to two of the four St. Charles County Circuit Judges, David and Donald Dalton. Also on that date Mr. Boggs for the first time provided (after repeated requests for same) names of some of the putative class members whom he intended to call to testify at the class certification hearing to be held just seven days later. Petitioner alleged that this was an obvious attempt at an

unconstitutional procedure (failure to provide Mr. Berry with timely notice of the nature of the claims against him) which was avoided only when Circuit Judge Fred Rush disqualified himself because of his previously concealed personal relationship (with one of the putative class members). Later, in a deposition taken in the civil rights case, *Berry v. Boggs, et al.*, Petitioner learned that Judge Rush had viewed at least one of the "bathroom" videotapes at his home with his paramour and discussed her case with her while he was considering on the critical motion in all these cases, that of the workers' compensation preemption defense.

On May 17, 1991 attorney Boggs called up for hearing before Circuit Judge Donald Dalton the class action plaintiffs' motion for "discovery" sanctions in the amount of $4,000. In light of the disqualification of Judge David Dalton, counsel for Mr. Berry moved that his brother be disqualified for cause. However, Judge Donald Dalton denied Berry's motion. The motion for sanctions was not heard that day only because the judge allowed co-defendant Schmitt, a white woman who was Berry's former paramour, to disqualify him without showing any "cause" although Missouri's civil rules did not permit such. Berry alleged on removal that his equal protection rights were thereby denied.

On May 7, 1990 attorney Jones and two of his clients filed in St. Charles County against Petitioner an "interpleader" action seeking a declaration by a St. Charles County Circuit Judge that Mr. Berry was the "owner" of the so-called "bathroom videotapes". The interpleader action alleged that the tapes were evidence in the other five removed cases, all of which make identical invasion of privacy claims and seek punitive damages. On removal, Berry alleged that interpleader was a vehicle to unlawfully circumvent his right to a jury trial on a fact issue crucial to imposing liability in the five removed cases: Was he the owner/ producer of the "bathroom" videotapes?

The "interpleader" later was dismissed after one of the interpleader plaintiffs filed a memorandum to the clerk dismissing her claim. The dismissal was docketed by the clerk "on parties stipulation" and "at defendants' costs". Mr. Berry, however, did not "stipulate" to anything in the interpleader case. He never received any notice from the St. Charles County Court of said dismissal or that he was supposedly liable for "costs". The dismissal was not uncovered by his counsel until the court's files were reviewed in July 1991 as counsel prepared for the filing of his civil rights case, *Berry v. Boggs, et al.*, currently pending for trial. On removal, Berry alleged this typified the unequal treatment of him in St. Charles County, a pervasive inequality which had no explanation other than its motivation by racial bias.

Although his "interpleader" had been dismissed at the time, attorney Jones sought "reopening" of the case and a ruling on the merits. Berry filed his Notice of Removal in the interpleader case within five days after he received notice of plaintiffs' attempt to reopen and obtain a final ruling.

The five punitive damages and one interpleader cases were removed pursuant to the Civil Rights Removal Act, 28 U.S.C § 1443(1). The first Notice of Removal was filed the day after Mr. Berry filed his federal civil rights complaint styled *Berry v. Boggs, et al.*, the others were filed in days thereafter. The six removed cases ended up in front of six different district judges. The principal opinion granting remand, authored by Chief District Judge Filippine, was adopted by the other judges. Appeal to the Eighth Circuit was taken under 28 U.S.C. § 1447(d). The Eighth Circuit's *per curiam* opinion affirming remand of all six cases essentially adopted the reasoning of Chief District Judge Filippine. Namely, the Ku Klux Klan Act was held not to be a proper basis for removal even when invoked against a "racially motivated economic lynching". The opinions avoided the issue of removability under the Equal Protection Clause.

REASONS FOR GRANTING THE WRIT

I.

THE LOWER COURTS ERRED IN RULING AS A MATTER OF LAW THAT CHUCK BERRY, A PROMINENT BLACK ENTERTAINER, FAILED TO INVOKE ON REMOVAL A LAW PROVIDING FOR EQUAL CIVIL RIGHTS WHEN HE ALLEGED IN ALL NOTICES OF REMOVAL VIOLATIONS OF HIS RIGHT TO EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT AND PROTECTED BY THE KU KLUX KLAN ACT.

This Petition presents a significant issue of first impression for the Court: Is 42 U.S.C. § 1985(3) a law providing for specific civil rights in terms of racial equality? The district court too glibly assumed it was not.

The district court granted remand without holding an evidentiary hearing on the sufficiency of Petitioner's civil rights removals. Therefore the allegations in the notices of removal and accompanying papers must be taken as true. *North Carolina v. Grant*, 452 F.2d 780, 782 (4th Cir. 1972) (§ 1443 removal case). In a § 1443 case where removal was upheld, the Second Circuit stated that a petition to remove "shall be . . . construed to do substantial justice' ". *White v. Wellington*, 627 F.2d 582, 587 (1980). *See also Calhoun v. City of Meridian*, 355 F.2d 209, 212 (5th Cir. 1966). The Eighth Circuit's *per curiam* opinion here conflicts with these decisions of the Second, Fourth and Fifth Circuits on the proper construction to be given a § 1443 removal. The Eighth Circuit did not even cite to the rules on construction, nor did it address the substantive issues raised by Petitioner's allegations under the Ku Klux Klan Act and the Equal Protection Clause.

Pleadings in a § 1443 removal must satisfy a two-pronged test. First, the right allegedly denied the removal petitioner must appear to arise under a federal law providing for specific civil rights stated in terms of racial equality. *Georgia v. Rachel,* 384 U.S. 780, 788 (1966). Second, a removing defendant must show that he/she "is denied or cannot enforce" the specified federal rights in the state courts. *Id.*

A. Allegations In The Notices Of Removal Of Violations Of Equal Protection Of The Laws Guaranteed By The Fourteenth Amendment Justify Removal.

In holding that Petitioner failed to allege in his Notice of Removal a violation of any law providing for civil rights in terms of racial equality, the lower courts focused only on his allegations of violations of 42 U.S.C. § 1983, while ignoring Berry's pleading under the Equal Protection Clause of the Fourteenth Amendment. But the district court's recitation of Berry's removal allegations made plain that Petitioner pleaded Equal Protection violations:

> Defendant Berry contends that removal is proper because he "has been and will be denied his equal civil rights because of the racially-motivated criminal prosecution which gave rise to and was in conjunction with the procedurally unconstitutional state civil actions which have been a *race oriented economic lynching*." . . . Defendant Berry alleges that judicial and prosecutorial personnel in St. Charles County, Missouri, are prejudiced against him and have engaged in a variety of acts which that Defendant contends deprive him of his "*rights to equal protection of the laws*, . . . as generally guaranteed by the Fifth, Seventh, Eighth, and *Fourteenth*

> Amendments to the Constitution and specifically protected by 42 U.S.C. §§ 1983, 1985 and 28 U.S.C. § 1443."

(App. C) (emphasis added). This Court has held that the Equal Protection Clause of the Fourteenth Amendment is a "law providing equal rights" for purposes of § 1443 removal, *Strauder v. West Virginia,* 100 U.S. 303, 311-12 (1879). Certiorari should issue, *inter alia,* to review the Eighth Circuit's failure to follow *Strauder.*

It is undebatable that a fundamental purpose of the Equal Protection Clause is to combat race discrimination. *Palmore v. Sidoti,* 466 U.S. 429, 432 (1984). In *Rachel,* this Court held that those removing defendants' reliance upon the Civil Rights Act of 1964 was sufficient to invoke § 1443(1) since that law confers a "specific right of racial equality". 384 U.S. at 792. Under the *Rachel* test, allegations that the right to equal protection of the laws as combatting racial discrimination provide a proper basis for a § 1443(1) removal.

B. Allegations In The Notice Of Removal Of Violations Of 42 U.S.C. § 1985(3) Were Sufficient To Justify Removal.

The Eighth Circuit affirmed without analysis the district court's finding that the § 1985(3) does not provide for specific civil rights stated in terms of racial equality (App. B and C, citing *Rachel,* 384 U.S. at 792). Careful review reveals that nowhere did the *Rachel* Court hold that § 1985 does not protect the right to racial equality. Petitioners find no decision by the Court on the question whether allegations that § 1985(3) rights were violated by state court proceedings is a sufficient basis for a § 1443(1) removal of a civil case. *Rachel*'s dictum that violations of 42 U.S.C. § 1983 would not properly invoke § 1443(1) does not extrapolate into a thoughtful rule for decision on removals under § 1985(3). The

plain language of §§ 1983 and 1985(3) show they are fundamentally different. Section 1983 broadly provides any person a cause of action for "deprivation of any rights . . . secured by the Constitution and laws . . .".

In contrast § 1985(3) specifically protects African-Americans against racially-motivated conspiracies. Indeed, the Court has ruled that § 1985, termed the Ku Klux Klan Act, was directed to eradicating racial bias fomented through private or official conspiracies. *United Brotherhood of C. & J. v. Scott*, 463 U.S. 825, 836 (1983) held: "The predominant purpose of § 1985(3) was to combat the prevalent animus against Negros and their supporters". *See also id.* at 837, holding the "central concern" of § 1985 was "combating the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, *Fourteenth*, and Fifteenth Amendments" (emphasis added).

The plain language of § 1985 makes clear that the statute is analogous to the Equal Protection Clause of the Fourteenth Amendment, but with the added virtue that its sweep extends to private conspiracies. As such § 1985 itself is a repository of rights provided to Black citizens — the "equal protection" and "equal privileges and immunities" rights to be free from racially based conspiracies. *See United Brotherhood*, 463 U.S. at 840-41 (Blackmun, J., dissenting with three justices).

To state a claim for violation of § 1985 a complaint "must" aver "some racial, or perhaps class-based, invidiously discriminatory animus behind the conspirators' action". *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). In *Griffin*, the Court found the following allegations sufficient to state a violation of § 1985: (a) a conspiracy to assault two Blacks, (b) of which the " 'purpose was to prevent [the] plaintiffs and other Negro-Americans, through . . . force, violence, and intimidation, from seeking the equal protection of the laws and from enjoying the equal rights,

privileges and immunities of citizens under the laws of the United States and the State of Mississippi,' including a long list of enumerated rights such as free speach . . .". *Id.* at 103.

Petitioner's allegations of § 1985 violations in these removals closely parallel those in *Griffin*. Mr. Berry alleged that the St. Charles County police, court and prosecutorial officials as well as private lawyers (one a former elected prosecutor in that county) and their clients conspired to deprive him of his § 1985 right to be free from racially motivated conspiracies to deny him equal protection of the laws. The conspiracy was made manifest, in part, through a racially-motivated unconstitutional criminal prosecution for "child abuse" of white minors arising from videotapes of persons using a public bathroom allegedly taken by Petitioner. Berry alleged that in the course of the criminal prosectution an assistant St. Charles County prosecutor stated: "One way or another we're going to get that nigger!".

The criminal prosecution followed closely on the heels of the June 1990 drug "raid" on Berry's estate. The raid revealed nothing, but was publicized conspiciously by the St. Charles County authorities in their efforts to pollute the atmosphere in St. Charles County by promoting false beliefs that Berry was involved in cocaine trafficking and child pornography. Closely coordinated with that "raid", the wrongful conspiracy under § 1985 also became transparent in its civil dimensions by the filing of the *Crawford* class action suit (removed to federal court) in St. Charles County Circuit Court just a few days later. The other removed cases followed. In all those cases, as in *Huck v. Berry* (filed soon after the officially-sanctioned burglaries by Vincent Huck and after Berry refused the blackmail), arbitrary and harsh rulings consistently adverse to Berry were made by biased judges with direct conflicts of interest which required them to recuse themselves. Those rulings show a consistent pattern of judicial refusal to apply the laws of Missouri equally to Berry. They can be

explained rationally only by a racial motive to destroy Berry, a visibly successful African-American.

Chuck Berry was targeted by purportedly hundreds of white female plaintiffs and their politically influential lawyers because of his race and wealth. Petitioner alleged on removal that the lawyers and "investigator" for those claimants conspired to use the civil and criminal processes of St. Charles County to attain that end. Under any standard, these allegations were sufficient to state a claim for violation of equal civil rights protected by § 1985 and were sufficient for removal under § 1443. The district court's remand rulings thus were erroneous as a matter of law.

The Court has made it clear that its jurisprudence in *Georgia v. Rachel* and *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), was not intended to be wholly and forever dispositive of every civil rights removal under the 1964 Civil Rights Act amendment to 28 U.S.C. § 1443: "A precise definition of the limitations of the phrase 'any law providing for . . . equal civil rights' in § 1443(1) is not a matter we need pursue to a conclusion". *Peacock*, 384 U.S. at 825. The *Peacock* Court went on to assume that both § 1971 (voting rights) and § 1981 (equality in the application of punishments, penalties and exactions) of Title 42 qualified under the test of *Georgia v. Rachel*, as laws "providing for . . . equal civil rights . . . construed to mean any law providing for specific civil rights stated in terms of racial equality" thus meeting the statutory definition of removability under 28 U.S.C. § 1443(1). *Peacock*, 384 U.S. at 825. *Accord, Johnson v. Mississippi*, 421 U.S. 213, 220-2 (1975).

In light of the observations by the Court over the years in *United Brotherhood, Peacock* and *Johnson* it defies elementary logic and historical common sense to find, as did the lower courts, that the Ku Klux Klan statute is not a law providing for equal civil rights stated in terms of racial equality for purposes of a § 1443(1) removal.

II.

THE LOWER COURTS ERRED IN RULING AS A MATTER OF LAW THAT A PATTERN OF RACIALLY DISCRIMINATORY CONDUCT IN RELATED STATE CRIMINAL AND CIVIL PROCEEDINGS WHICH AMOUNTS TO A "RACIALLY-MOTIVATED ECONOMIC LYNCHING" CAN FORM UNDER NO CIRCUMSTANCES A BASIS FOR REMOVAL PURSUANT TO THE CIVIL RIGHTS REMOVAL STATUTE.

The lower courts here held that under no circumstances could a pattern of racially-discriminatory conduct in multiple state court actions form a basis for a § 1443 removal because Petitioner did not allege a discriminatory state legislative enactment. Thus, it was ruled that Petitioner failed to satisfy *Rachel's* second prong (App. B and C).

The Court need look no further than *Rachel* itself for controlling authority making the lower courts' rulings erroneous as a matter of law. In *Rachel,* the Court held that a § 1443

> *removal* might be *justified,* even in the *absence* of a *discriminatory state enactment,* if an equivalent basis could be shown for an equally *firm prediction* that the defendant would be "denied or cannot enforce" the specified federal rights in the state court. Such a basis for *prediction* exists in the present case.

384 U.S. at 804 (emphasis added). *Rachel* upheld § 1443 removals of state court criminal prosecutions for trespass even though the state statute was not facially unconstitutional, but was applied to the removing parties in a racially discriminatory *manner.* The

Rachel defendants were prosecuted for criminal trespass, a law facially neutral, solely because of their race when they attempted to obtain service in a "whites-only" restaurant and refused to leave. The Court held that "[i]n the narrow circumstances of this case, *any* proceedings in the courts of the State will constitute a denial of the rights conferred by the Civil Rights Act of 1964 . . . if the allegations of the removal petition are true". *Id.* (emphasis in original).[2]

Petitioner alleged on removal that such a "firm prediction" — that he could not enforce his equal civil rights in the St. Charles County, Missouri Circuit Court — could be made from the record existing at the time of removal: (1) the unconstitutional "raid" on his estate; (2) press conferences falsely claiming he was a Black drug dealer; (3) bogus "child abuse" charges supposedly arising out of the videotapes on which the hundreds of punitive damages claims allegedly are based; and (4) numerous pre-trial rulings against Petitioner in the course of the punitive damages case which were contrary to Missouri law and defied rational explanation other than a racial discrimination motive. Clearly "any proceedings", *Rachel*, in the courts of Missouri "will constitute a denial", *id.*, of Petitioner's equal civil rights to be free from racial discrimination. The improper focus in the rulings of the lower courts in this case upon a misperceived need for discriminatory legislative enactments directly conflicts with this Court's 1966 decision in *Rachel*. This alone is reason enough to grant this Petition.

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2. *Neal v. Delaware*, 103 U.S. 370, 392 (1880) seems to indicate that racially dicriminatory state court decisions, violating the Fourteenth Amendment, could provide a basis for a civil rights removal.

A. The Court's Removal Decisions Under the 1964 Civil Rights Act Conflict Among Themselves On A Key Issue Raised Here.

Granting this Petition will permit the Court to reconcile the apparent conflicts between its own decision on the crucial point of whether only explicit legislative discrimination can be reached under the Civil Rights Removal power. Lower court cases construing § 1443, including the Eighth Circuit here, have cited to *Peacock*, 384 U.S. 808 and *Johnson*, 421 U.S. 213 for the dubious proposition that a § 1443 removal is proper only when the denial of equal civil rights is clear from discriminatory state laws. Of course, *Rachel* explicates no such limited interpretation of § 1443(1). So the question becomes how to interpret *Rachel, Johnson* and *Peacock* with any jurisprudential consistency.

The Court in *Peacock* distinguished on one level the removals of state criminal proceedings there from the successful removal in *Rachel* by noting that "in *Rachel* the defendants relied on the specific provisions of a pre-emptive federal civil rights law". 384 U.S. at 826. While the "pre-emptive" label was a ready explanation for that distinction, it hardly completes the inquiry required by the issues presented here. *Peacock* made clear that its rationale did not exhaustively define the outer parameters of which civil rights laws would justify removal under § 1443(1). *Id.* at 825. The *Peacock* Court also established that the essence of the removal inquiry was whether the deprivation of a protected federal right could be "clearly predicted". *Id.* at 828.

A prosecutor in the unsuccessful criminal proceeding fomented by the plaintiffs in these removed cases described Mr. Berry as a "nigger" they were out to "get" and made it apparent there is a strong racial component to these proceedings against Petitioner. This pervasive racial bias has taken many forms which have deprived Petitioner of his equal civil rights in the courts of St.

Charles County. The Eighth Circuit's decision in this case stands as precedent for the dangerous proposition that under no circumstances can a pattern of racially-discriminatory conduct in state court proceedings form a basis for a valid removal under § 1443, not even when those proceedings are converted into an "economic lynching". Although the *per curiam* Opinion glossed over this element of the district courts' analyses, it will be a sad day in the annals of civil rights jurisprudence if the district court is allowed to stand uncorrected in its assertion that these removals fail to satisfy the second prong of *Rachel's* § 1443 removal test because Chuck Berry's rights were not violated by Missouri *legislation.*

The *Rachel* Court noted that thte 1964 amendments to § 1443 were not suggestive of congressional intent to limit the scope of removal. In fact, *Rachel* noted Congress' "choice of the open-ended phrase". 384 U.S. at 789. In the words of the *Peacock* Court, this case is one of those rare situations where a "clear prediction" can be made that Petitioner's federal civil rights will be denied. 384 U.S. at 828. A long, sad history of unequal treatment and racially punitive rulings and sanctions underlies these removals.

Neither the Equal Protection Clause nor the protections of 42 U.S.C. § 1981 nor the prohibitions of § 1985(3) probably merit the label of "a preemptive federal civil rights law" invoke as a rationale by the *Peacock* Court. Yet it is surpassingly clear the the fundamental purpose of the Equal Protection Clause is to combat racial discrimination, *Palmore v. Sidoti, supra.* Obviously the Ku Klux Klan Act also exists to combat racial discrimination. In light of the Court's qualification or reservation concerning 42 U.S.C. § 1981 in *Peacock* and *Johnson*, it would appear that unequal application in a state court of a fine or penalty ("sanctions") against an African-American would be held removable even if such unequal application were not mandated by a state statute. Rigorous intellectual scrutiny is merited by the points Petitioner Berry

raises, but all has been withheld until now. Only the Court can provide the requisite systematic scrutiny now.

B. The Proper Test In A Civil Case For Removal Under § 1443(1) Is Whether Or Not A "Clear Prediction" Can Be Made That Equal Civil Rights Will Be Violated.

It is somewhat uncertain what the *Peacock* and *Johnson* Courts intended by their description of *Rachel* as a case involving a "pre-emptive" federal statute. But one can accept pre-emptive labeling as a tool for first-stage analysis while realizing that the label is not by itself a complete description of the proper analytic process. Rather, it is a shorthand for the Court's reasoning and public-policy formulation in defining the congressional intent behind the 1964 re-enactment of § 1443.

The keys to proper interpretation of § 1443(1), Petitioner submits, are clarity of prediction, the feasibility or policy practicalities connoted by the removal, and its implications for federalism. The Ku Klux Klan Act may not be a "pre-emptive" civil rights law, but surely its violation in state court criminal and civil proceedings that are a "racially motivated economic lynching" merits a "clear prediction", *Rachel*, that Mr. Berry's rights will be violated. It is not enough for the Court to wait for an eventual opportunity to review in a few years whether the Missouri high courts have acted to correct the evident bias of the St. Charles County Circuit Court. Merely requiring Mr. Berry to stand trial in St. Charles County on these suits violates his right to be free from conspiracies which violate the Ku Klux Klan Act.

The Court's jurisprudence has carefully left open the door to removal in restricted but compelling situations where the federal rights requiring the protection of a federal forum do not appear in a "pre-emptive" federal statute. In *Johnson v. Mississippi*, 421 U.S. at 220, the Court hinted at the eventuality of doing a case-by-case

analysis for determining removal in more difficult cases, such as here. While continuing to apply the two prongs of *Rachel*, the *Johnson* Court was careful to sprinkle its decision with qualifiers such as "[c]laims under statutes not protecting against racial discrimination will not suffice"; "without evidentiary basis does not, standing alone, satisfy"; and "the unusual case where an equivalent basis could be shown for an equally firm prediction". The Court has provided ample room for a civil case such as this one to be removed to the federal system under § 1443(1).

To hold that removal was proper here would not require the Congress to add "hundreds of new federal judges". *Peacock*, 384 U.S. at 834. While Congress did not intend to provide a federal forum for the thousands of Black criminal defendants in Southern state courts or to work "a wholesale dislocation of the historic relationship between the state and federal courts in the administration of the criminal law", *Id.* at 831, there is sound reason to find that Congress never intended that procedurally biased civil cases such as these should remain beyond the removal jurisdiction of the federal courts. *See* the remarks of Senator Dodd, as floor manager of the 1964 Act, 110 Cong. Rec. 6955 (use of court procedures as a means of intimidation). There can be scant doubt that intimidating Petitioner into parting with most, if not all of his wealth is what the police, prosecutorial and judicial authorities of St. Charles County have in mind. Their intent to advance the interests of the white female litigants is entitled to no deference. Surely Congress never intended to allow an outrage such as this to progress untouched by federal protection until long after potentially devastating punitive damages judgments are taken and executed.

The essential focus of the Court in *Johnson* was upon the issue of whether or not a "clear prediction" could be made. Petitioner strongly contends that this record presents such a "rare situation" offering a "clear prediction". It defies common sense to contend

the Court would hold that § 1985 is not a law providing for equal civil rights within the meaning of § 1443. Correct analysis of the Court's jurisprudence compels two contrary conclusions. First, the Court would hold that the Ku Klux Klan statute is a law providing for equal civil rights. Second, on this record the Court will find a basis for the requisite "clear prediction" that the state court proceedings in these five removed cases have operated and will operate to deprive Petitioner of his rights under § 1985 and the Equal Protection Clause, if the Writ issues.

While it is easier to apply *Rachel*'s two-prong analysis to federal statutes labeled as "pre-emptive", it by no means follows that invoking a federal right carrying that label is a requisite for § 1443(1) removal. To the contrary, careful exegesis of the Court's teachings compels one to confront the inescapable conclusion that the Court has explicitly refrained from any such formulation. It is difficult to accept that the Eighth Circuit intended its opinion to stand on this issue of first impression for the proposition that a violation of the Ku Klux Klan statute, even one which amounts to "a racially-motivated economic lynching" to strip Petitioner Berry of his royalty rights and other property, cannot justify removal.

C. The Court Has Never Defined The Proper Standard For Removal Of Civil Actions And The Eighth Circuit Declined To Follow Precedents Of Other Courts Of Appeal.

The Court apparently has considered only two civil rights removals of civil actions. *See Dubuclet v. Louisiana,* 103 U.S. 550 (1880) and *Schmidt v. Cobb,* 119 U.S. 286 (1886), neither discussing in detail the standards for removal. Since the 1964 Civil Rights Act the Court has considered no removals of civil actions under § 1443.

The Eighth Circuit's ruling conflicts with decisions by other Circuits. In *Sofarelli v. Pinellas County,* 931 F.2d 718 (11th Cir.

1991) a case was filed in state court seeking to enjoin Sofarelli from moving his home (a trailer). Mr. Sofarelli "suspected . . . that the plaintiffs had racial motivations for attempting to enjoin him from completing the house move". *Id.* at 724. The Eleventh Circuit, citing *Rachel,* held that "removal under § 1443 is *proper when a lawsuit filed in state court is itself the act* by which the movant's civil rights are violated" and approved Sofarelli's removal. *Id.* at 725 (emphasis supplied). Thus, *Rachel* has been interpreted to authorize removal under § 1443 of a civil lawsuit if the filing of the state court action was racially motivated. *See also Conrad v. Robinson,* 871 F.2d 612 (6th Cir. 1989) (holding a state libel action properly removed under § 1443(1) because it was filed in retaliation for exercise of Title VII rights).

The need to clarify the proper standard for removal of a civil case is highlighted by the Eighth Circuit's indifference to the probability that Petitioner Chuck Berry will have been financially devastated by Missouri's unconstitutional application of punitive damages long before the Court is able to review the St. Charles County Court's denials of his equal civil rights. *See Pacific Mut. Life Ins. Co. v. Haslip,* 111 S. Ct. 1032 (1991) and the misapplication of its "constitutional calculus" in *Wolf v. Goodyear Tire & Rubber Co.,* 808 S.W. 2d 868 (Mo. App. 1991). Missouri's onerous supersedeas bonding requirements will require posting of bonds satisfactory to the St. Charles County's racially biased judges to postpone execution against, and Sheriff's sales of all of Chuck Berry's musical properties before the appeal and review of abusive punitive damages judgements. *See* Mo. Rev. Stat. § 512.080 and Rule 81.09 Mo. R. Civ. P.

CONCLUSION

Congress undoubtedly intended the purposely flexible language in § 1443 to protect against the financial equivalent of lynching through punitive damages carried out against a prominent and prosperous Black American who has been subjected to progressively egregious violations of his equal rights in the filing and prosecution of connected state criminal and civil actions. Petitioner is willing to confront his accusers on neutral ground where he cannot be "lynched" by hostile authorities. Certiorari should issue to (a) clarify the availability of a § 1443(1) removal when equal protection violations are alleged; (b) address as an issue of first impression whether 42 U.S.C. § 1985(3) is a law providing for equal civil rights for § 1443(1) removals; and (c) identify the standards underlying removal of a civil action under § 1443(1).

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT – DATED AUGUST 20, 1992

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1721/1726/1731/1732/1933/2134EMSL

John Doe, et al.,

Plaintiff - Appellees,

vs.

Charles E. Berry, et al.,

Defendants - Appellants.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

August 20, 1992

Order Entered at the Direction of the Court:
s/ illegible
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JUNE 30, 1992

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1721

J. Doe,

Appellee,

v.

Charles E. Berry; Chuck Berry Communication Systems, Inc.,

Appellants.

No. 92-1726

Hosana Huck; Marianne McKinley,

Appellees,

v.

Charles E. Berry; Chuck Berry Communication Systems, Inc.; Francine Gillium,

Appellants.

Appendix B

No. 92-1731

A. Doe,

Appellee,

v.

Charles E. Berry; Chuck Berry Communication Systems, Inc.,

Appellants

No. 92-1732

Thomas F. Jones; Hosana A. Huck; Marianne McKinley,

Appellees,

v.

Charles E. Berry,

Appellant.

No. 92-1933

Nancy Crawford; Melissa Walker; Rep. Parties on behalf of a Definable Class,

Appellees,

v.

Charles E. Berry; Chuck Berry Communication Systems, Inc.,

Appellants.

Appendix B

No. 92-2134

Rebecca Price,

Appellee,

v.

Charles E. Berry; Chuck Berry Communication Systems, Inc.,

Appellants.

Appeals from the United States District Court for the Eastern District of Missouri.
PUBLISHED

Submitted: June 9, 1992

Filed: June 30, 1992

Before JOHN R. GIBSON, Circuit Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

PER CURIAM.

Charles E. Berry, Chuck Berry Communication Systems, Inc., and Francine Gillium appeal from several district court orders remanding their cases to the state courts on the ground that they were not properly removed under 28 U.S.C. § 1443(1) (1988), the civil rights removal statute. Berry argues on appeal that he has established a pattern of racial hostility prohibited by several civil rights statutes, making removal proper. We affirm the judgments of

the district courts.[1]

A number of actions were filed against Berry and others in the Circuit Court of St. Charles County, Missouri, alleging invasion of privacy by secretly videotaping the plaintiffs. An interpleder action was also filed to determine ownership of the videotapes. After passage of some period of time and considerable litigation activity, Berry filed a petition for removal in each of the cases based on 28 U.S.C. §§ 1441(b) (1988), 1443, and 1446 (West Supp. 1992). Berry claimed that removal was possible pursuant to section 1443 because he "has been and will be denied his equal civil rights because of the racialy-motivated criminal prosecution which gave rise to and was in conjunction with the procedurally unconstitutional state civil actions which have been a race oriented economic lynching." Berry alleged, *inter alia*, that he had been deprived of rights that were specifically protected by 42 U.S.C. §§ 1983 (1988) and 1985 (1988) and 28 U.S.C. § 1443.

Chief Judge Filippine,[2] in *J. Doe v. Berry*, No. 91-1617-C-2 (E.D. Mo. Feb. 19, 1992), found that a person seeking removal under 28 U.S.C. § 1443 must show that he relies upon a " ' " right

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1 The Honorable Edward L. Filippine, Chief Judge, Stephen N. Limbaugh, Jean C. Hamilton, George P. Gunn, Jr., William L. Hungate, and Clyde S. Cahill, United States District Judges for the Eastern District of Missouri.

2 The district judges ruling on the other cases either adopted and incorporated Chief Judge Filippine's order, *see Huck v. Berry*, No. 91-1599-C-5 (E.D. Mo. Feb. 24, 1992) (Limbaugh, J.); *Jones v. Berry*, No. 91-1940-C-6 (E.D. Mo. Feb. 25, 1992) (Gunn, J.); *Crawford v. Berry*, No. 91-1597-C-3 (E.D. Mo. Feb. 21, 1992) (Hungate, J.); *Price v. Berry*, No. 91-1598-C-4 (E.D. Mo. Apr. 16, 1992) (Cahill, J.), or based their rulings on essentially the same reasoning Chief Judge Filippine used in his order. *See, e.g., Doe v. Berry*, No. 91-1616-C-7 (E.D. Mo. Feb. 25, 1992) (Hamilton, J.).

under any law providing for . . . equal civil rights," and that they are "denied or cannot enforce" that right in the court of [the state].' " Slip op. at 3 (quoting *Georgia v. Rachel*, 384 U.S. 780, 788 (1966)). The district court held that allegations of violations of 42 U.S.C. § 1983 did not meet the test in *Rachel* that the right allegedly being denied is a law " 'providing for specific civil rights stated in terms of racial equality.' " *Id.* at 4 (quoting *Rachel*, 384 U.S. at 792). The district court also held removal under 28 U.S.C. § 1443 based on alleged violations of 42 U.S.C. § 1985 to be improper for the same reasons. *Id.* The district court observed that "[a] defendant's contention that he will be denied a fair trial in state court is not a sufficient ground for removal." *Id.* at 5.

We expedited appeal and heard oral argument. The appeal from the remand is appealable under 28 U.S.C. § 1447(d) (1988) as removal was based on 28 U.S.C. § 1443.

Berry argues that the district court erroneously ruled that (1) he had failed to invoke a law providing for equal civil rights based on race; (2) a pattern of racial conduct in state and civil proceedings which amounted to a "racially motivated economic lynching" in no way forms a basis for removal; and (3) his pleadings under section 1443(1)[3] were insufficient. He also argues

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3 The relevant portion of 28 U.S.C. § 1443 states:

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisidiction thereof. . . .

that he was denied equal protection of laws when he was not given benefit of the laws giving preemptive effect to worker's compensation laws and that he is exposed to proceduraly unconstitutional, excessive awards of punitive damages unless he is allowed to proceed in federal court. Many of Berry's claims involve a St. Charles County circuit court judge, numerous expressions made in press conferences, and conflicts of interest of various judges participating in the cases.

After having heard argument, we are convinced that the orders of remand must be affirmed. The district courts' analyses of the removal issues under 28 U.S.C. § 1443(1) with reliance on 42 U.S.C. §§ 1983 and 1985(3) are not in error. Chief Judge Filippine properly followed *Rachel,* which held that "the phrase 'any law providing for . . . equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality." 384 U.S. at 792. Further, Chief Judge Filippine properly noted the controlling rule from *Rachel,* which ensures that:

> [T]he task of prediction would not involve a detailed analysis by a federal judge of the likely disposition of particular federal claims by particular state courts. That task not only would have been difficult, but it also would have involved federal judges in the unseemly process of prejudging their brethren of the state courts.

Id. at 803.

As the Supreme Court stated in *City of Greenwood v. Peacock,* 384 U.S. 808 (1966):

> It is *not* enough to support removal under § 1443(1) to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any other manner the defendant will be "denied or cannot enforce in the courts" of the State any right under a federal law providing for equal civil rights. The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial. Under § 1443(1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court.

Id. at 827-28 (emphasis in original) (citations omitted).

The issues involved in these cases can be decided in the state courts, which have equal responsibility for ruling on federal constitutional issues. Berry may then seek review of any adverse rulings in the United States Supreme Court.

Appendix B

We have considered and reject Berry's other arguments.

We affirm the orders of remand.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION FILED APRIL 16, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

REBECCA PRICE,

Plaintiff,

v.

CHARLES E. BERRY,

Defendant.

Cause No. 91-1598-C(4).

MEMORANDUM AND ORDER

This matter is before the Court on plaintiff's objection to removal and defendant Berry's motion to consolidate. Defendant seeks to consolidate at least six causes filed in this court, causes No. 91-1597-C(3); 91-1599-C(5), 91-1616-C(7), 91-1617-C(2), and 91-1940-C(6) with this cause, No. 91-1598-C(4). Consolidation is only granted when there has been a concurrence among the judges presiding in the particular cases involved. By order dated February 19, 1992, the Honorable Edward L. Filippine denied an analogous motion to consolidate filed in that case. Therefore, this Court will deny defendant's motion to consolidate as moot.

Appendix C

The underlying cause of action sought to be removed in the cases listed herein arose out of similar or same circumstances and with respect to the issue of remand, the Court agrees with Judge Filippine's reasoning in *J. Doe v. Charles E. Berry,* No. 91-1617-C(2), and, accordingly, will adopt and incorporate that order as equally applicable in this case. Therefore,

IT IS HEREBY ORDERED that defendant's motion to consolidate is denied as moot.

IT IS FURTHER ORDERED that plaintiff's objection to removal is sustained.

IT IS FURTHER ORDERED that this matter is remanded to the Circuit Court for St. Charles County, Missouri.

Dated this 16th day of April, 1992.

s/ Clyde S. Cahill
Clyde S. Cahill
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION FILED FEBRUARY 25, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

A. DOE,

Plaintiff,

v

CHARLES E. BERRY, CHUCK BERRY COMMUNICATIONS SYSTEMS INC.,

Defendants.

Cause No. 91-1616C(7)

ORDER

In accordance with the memorandum and order filed this day, IT IS HEREBY ORDERED that this matter is REMANDED to the Circuit Court of St. Charles County, Missouri, from which it was removed.

Dated this 25th day of February, 1992

s/ Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

Appendix C

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION FILED FEBRUARY 25, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

A. DOE,

Plaintiff,

v.

CHARLES E. BERRY, CHUCK BERRY COMMUNICATIONS SYSTEMS INC.,

Defendants.

Cause No. 91-1616C(7)

MEMORANDUM AND ORDER

This matter is before the Court on Plaintiff's motion to remand. Both parties request a hearing.

Plaintiff originaly filed this action for personal injuries, invasion of privacy, and intrusion upon seclusion and privacy in the Circuit Court of St. Charles County, Missouri, on November 27, 1990. Defendants were served with a Summons and Petition in the state action on December 4, 1990. (Notice of Removal ¶ 2). Defendants filed a notice of removal pursuant to 28 U.S.C. §§

1331, 1343, 1441(b), 1443, and 1446 on August 2, 1991. (Notice of Removal ¶ 1). On August 22, 1991, Plaintiff filed a motion to remand, referring the Court to Respondent's Answers to Petitioner's Notice of Removal of Civil Action filed August 9, 1991.

Plaintiff moves for remand on the grounds the Defendants' notice of removal was untimely pursuant to 28 U.S.C. § 1446(b) and that Defendants have insufficient grounds for removal pursuant to 28U.S.C. § 1443.

Defendants contend that removal is proper pursuant to 28 U.S.C. § 1443 and timely pursuant to the second paragraph 28 U.S.C. § 1446(b).

Removal pursuant to 28 U.S.C. § 1443(1) is proper when a state civil action or criminal prosecution is "[a]gainst any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof." To meet the requirements of 28 U.S.C. § 1443(1), Defendants must show (1) that the right upon which they rely is a right under a law providing for equal civil rights and (2) that Defendants have been denied or cannot enforce that right in state court. *Georgia v. Rachel*, 384 U.S. 780, 788 (1966). Defendants specifically rely on the rights conferred in 28 U.S.C. §§ 1983 and 1985. (Notice of Removal ¶3). Neither 42 U.S.C. § 1983 nor 42 U.S.C. § 1985 provide for "specific civil rights stated in terms of racial equality" as required by 28 U.S.C. § 1443(1). *Id.* at 792. Therefore, Defendants have failed to meet the first requirement for removal pursuant to 28 U.S.C. § 1443(1). Furthermore, Defendants establish neither that the denial is "manifest in a formal expression of state law" nor that the case falls into the narrow circumstances that "*any* proceedings in the courts of the State will constitute a

denial." *Id.* at 803-04 (emphasis in original).

Defendants also cite 28 U.S.C. § 1441(b) as a basis of removal. 28 U.S.C. § 1441(b) does not provide an independent basis for federal court jurisdiction, but rather merely provides for the removal to federal courts of any cases over which the Court would have had original jurisdiction. *West v. Missouri Bd. of Law Examiners*, 520 F. Supp. 159, 160 (E.D. Mo.), *aff'd*, 676 F.2d 702 (8th Cir. 1981). In this case, Plaintiff's claims are based solely on state law, and there is no basis for removal pursuant to 28 U.S.C. § 1441(b).

Because the Court finds that removal is not proper under either 28 U.S.C. § 1441(b) or § 1443, the Court will not address the issue of timeliness.

IT IS HEREBY ORDERED that Plaintiff's motion to remand is GRANTED.

IT IS FURTHER ORDERED that the parties' requests for a hearing on the remand issue are DENIED.

IT IS FURTHER ORDERED that this matter is REMANDED to the Circuit Court of St. Charles County, Missouri from which it was removed.

Dated this 25th day of February, 1992.

s/ Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION FILED FEBRUARY 24, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

HOSANNA HUCK, ET. AL.,

Plaintiffs,

vs.

CHUCK BERRY, ET. AL.,

Defendants.

No. 91-1599C(5)

ORDER

IT IS HEREBY ORDERED that the Order and Memorandum of the Honorable Chief Judge Edward L. Filippine in Cause No. 91-1617C(2), dated February 19, 1992, be and is ADOPTED and INCORPORATED herein.

IT IS FURTHER ORDERED that plaintiffs' motion for remand and for sanctions be and is GRANTED in part and DENIED in part in that this cause is remanded to the Circuit Court of St. Charles County. Sanctions will not be imposed.

IT IS FURTHER ORDERED that defendants' motion to

consolidate be and is DENIED.

IT IS FINALLY ORDERED that any pending motions may be considered by the Circuit Court of St. Charles County on remand.

Dated this 24th day of February, 1992.

s/ illegible
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION FILED FEBRUARY 24, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 91-1597C(3)

NANCY D. CRAWFORD, et al.,

Plaintiffs,

vs.

CHARLES E. BERRY, CHUCK BERRY COMMUNICATION SYSTEMS, INC., and THERESA YVONNE SCHMITT,

Defendants.

ORDER

This matter is before the Court on plaintiffs' motion to remand and for sanctions, to which defendant Charles E. Berry is opposed. Also before the Court is Berry's motion to consolidate.

Under Local Rule 7(F), motions to consolidate are to be filed in the lowest-numbered case of those sought to be consolidated and ruled on by the judge presiding in that case. Of the seven related actions of which this case is one, the lowest-numbered is *Charles E. Berry, etc., et al. v. Ronald L. Boggs, et al.*, No. 91-1586C(2). By order dated February 19, 1992, the Honorable Edward L. Filippine

has denied the analogous motion to consolidate filed in that case. Accordingly, the instant motion to consolidate is denied as moot.

Plaintiffs move for remand on the gounds that (1) the notice of removal was not timely filed and was filed on behalf of only one of the three defendants, and (2) the case is not a proper one for removal under the statutes governing removal. By order dated February 19, 1992 in *J. Doe v. Charles E. Berry, et al.*, No. 91-1617C(2), Judge Filippine granted a motion to remand analogous to the instant motion. Here as in *J. Doe*, all three counts of the petition are based on theories of common law tort. Removal was predicated on the same basis in *J. Doe* as it is here, i.e., on Berry's claim (stated in the notice of removal only, and not in any causes of action brought by Berry in this case) that he:

> is and has been denied and cannot enforce in the courts of the State of Missouri his rights to equal protection of the laws, due process of law, freedom from excessive fines, and a free and impartial jury trial as generaly guaranteed by the Fifth, Seventh, Eighth, and Fourteenth Amendments to the Constitution and specificaly protected by 42 U.S.C. §§ 1983, 1985 and 28 U.S.C. § 1443.

Notice of Removal, p. 2.

This Court finds Judge Filippine's reasoning in *J. Doe* to be equally applicable to the instant case. A copy of Judge Filippine's order is attached hereto and incorporated herein by reference. For the reasons stated in Judge Filippine's order, this Court holds that removal of the instant case is not proper under either 28 U.S.C. § 1441(b) or § 1443. In view of that conclusion, the Court does not

address plaintiffs' arguments concerning timeliness and the failure of the other defendants to join in the notice of removal. The instant case is remanded to the Circuit Court of St. Charles County.

Plaintiffs seek sanctions under Fed.R.Civ.P. 11 and 28 U.S.C. § 1447(c), arguing that "this matter was removed improvidently without any justification whatsoever." Motion to Remand and for Sanctions, p. 8. Removal having been found improper, the Court will grant the motion for sanctions to the extent that it is based on § 1447(c), which provides that upon remand the Court "may require payment of just costs and any actual expenses, including attorney fees, incured as a result of removal." Because Berry's opposition to the motion to remand offers non-frivolous arguments concerning both timeliness and availability of removal under §§ 1441 and 1443, the Court denies the motion to the extent that it is based on Rule 11, Plaintiffs are ordered to file, within seven days, appropriate affidavits and documentation supporting their claim for attorney fees and expenses incurred as a result of removal. Within seven days thereafter, defendant Berry may file with the Court any response to plaintiffs' claims and support therefor. The Court warns that insufficiently documented claims and claims for expenses not incurred due to removal will be rejected and may result in a reversal of the Court's award of costs and fees.

Accordingly,

IT IS HEREBY ORDERED that "petititioner's motion to consolidate" is denied as moot.

IT IS FURTHER ORDERED that plaintiffs' motion to remand and for sanctions is granted in part and denied in part. To the extent that the motion seeks remand, it is granted, and this matter is remanded to the circuit Court of St. Charles County, Missouri. To

the extent that the motion seeks sanctions based on Fed.R.Civ.P. 11, it is denied. To the extent that the motion seeks sanctions based on 28 U.S.C. § 1447(c), it is granted.

IT IS FURTHER ORDERED that plaintiffs shall file, within seven (7) days of the date of this order, appropriate affidavits and documentation supporting their claim for attorney fees and expenses incurred as a result of removal. Within seven (7) days thereafter, defendant Berry may file a written response thereto. Insufficiently documented claims and claims for expenses not incurred due to removal will be rejected and may result in a reversal of the Court's award of costs and fees under 28 U.S.C. § 1447(c).

s/ illegible
UNITED STATES DISTRICT JUDGE

Dated: 2-21-92

Appendix C

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI DATED FEBRUARY 19, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 91-1617 C (2)

J. DOE,

Plaintiff,

v.

CHARLES E. BERRY and CHUCK BERRY COMMUNICATION SYSTEMS, INC.,

Defendants.

ORDER

In accordance with the memorandum and order filed this date and incorporated herein,

IT IS HEREBY ORDERED that this mater is REMANDED to the Circuit Court for St. Charles County, Missouri, from which it came.

Dated this 19th day of February, 1992.

s/ Edward L. Filippine
UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 91-1617 C (2)

J. DOE,

Plaintiff,

v.

CHARLES E. BERRY and CHUCK BERRY COMMUNICATION SYSTEMS, INC.,

Defendants.

MEMORANDUM AND ORDER

This matter is before the Court on plaintiff's motion to remand and defendants' motion to consolidate. Defendant Berry opposes plaintiff's motion to remand. Both parties request a hearing on the remand issue.

Plaintiff originally filed this action in the Circuit Court of the County of St. Charles, State of Missouri. Plaintiff seeks damages for personal injuries, invasion of privacy and intrusion upon seclusion and privacy allegedly resulting from the individual defendant's secret videotaping and photographing of the female plaintiff while she used the bathroom and dressing facilities at the Southern Aire restaurant. Defendant corporation allegedly operated the restaurant on premises leased from the individual defendant. Plaintiff further alleges the individual defendant is the

sole shareholder of the corporate defendant. It is undisputed that the individual defendant was served with process and complaint on or about January 18, 1991. On August 2, 1991, the individual defendant sought removal of the action to this Court based on 28 U.S.C. §§ 1441(b), 1443 and 1446 and this Court's jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Plaintiff moves for remand on the gounds 1) removal was untimely under 28 U.S.C. § 1446(b) and, 2) defendants have insufficient grounds for removal.

Defendant Berry contends that removal is proper because he "has been and will be denied his equal civil rights because of the racially-motivated criminal prosecution which gave rise to and was in conjunction with the procedurally unconstitutional state civil actions which have been a race oriented economic lynching." Defendant Berry's Memorandum in Opposition to Motion to Remand, filed September 27, 1991, at 12. Defendant Berry alleges that judicial and prosecutorial personnel in St. Charles County, Missouri, are prejudiced against him and have engaged in a variety of acts which that defendant contends deprive him of his "rights to equal protection of the laws, due process of law, freedom from excessive finds, and a free and impartial jury trial as generally guaranteed by the Fifth, Seventh, Eighth, and Fourteenth Amendments to the Constitution and specifically protected by 42 U.S.C. §§ 1983, 1985 and 28 U.S.C. § 1443." Notice of Removal of Civil Action, filed August 2, 1991 at 1-2. Defendant Berry urges that he cannot enforce his civil rights guaranteed to United States citizens in the Missouri state courts and therefore removal is proper under 28 U.S.C. § 1443(1).[1]

---

1 28 U.S.C. § 1443(2) confers authority to remove only upon federal officers or agents. *City of Greenwood v. Peacock*, 384 U.S. 808 (1966). Therefore, because no federal officers or agents are involved, the Court assumes defendant Berry is asserting authority to remove under § 1443(1) only.

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In response to plaintiff's timeliness argument, defendant Berry asserts that the second paragraph of 28 U.S.C. § 1446(b) provides for an extended period of time for filing a notice of removal in civil rights cases analogous to the extension of time provided for filing civil rights complaints in federal courts under the "continuing violation" theory. The Court will first address whether the individual defendant's allegations against the Missouri state court and prosecutor are sufficient to permit removal under either 28 U.S.C. § 1441(b) or 28 U.S.C. § 1443. Only if the Court finds sufficient grounds for removal under either of these sections will it address the parties' timeliness arguments.

Removal is proper under 28 U.S.C. § 1443(1) when a civil action or criminal prosecution is commenced in state court "[a]gainst any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof[.]" The United States Supreme Court has held that defendants seeking removal under this section must meet a two part test. "They must show both that the right upon which they rely is a 'right under any law providing for * * * equal civil rights,' and that they are 'denied or cannot enforce' that right in the court of [the state]." *Georgia v. Rachel,* 384 U.S. 780, 788 (1966). To meet the first of the test, a defendant must show that the law under which a right is allegedly being denied is a law "providing for specific civil rights stated in terms of racial equality." *Id.* at 792. The Supreme Court gave as examples of such a law The Civil Rights Act of 1964, "as distinguished from laws, of which the due process clause and 42 U.S.C. § 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all." *Id.* (quotation omitted). Therefore, removal is not proper under 28 U.S.C. § 1443 based on alleged violations of 42 U.S.C. § 1983.

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Defendant Berry specifically relies on 42 U.S.C. § 1983 as a law under which he is deprived of rights in seeking removal of this case. He also relies on alleged deprivations of rights under 42 U.S.C. § 1985. Berry does not specify under which subsection of § 1985 he relies. However, 42 U.S.C. § 1985 does not provide for "specific civil rights stated in terms of racial equality" but confers general rights upon all citizens. *Rachel*, 384 U.S. at 792. Therefore, for the same reasons removal of this case is improper for alleged violations of 42 U.S.C. § 1983, removal under 28 U.S.C. § 1443 based on alleged violations of 42 U.S.C. § 1985 also is improper. Even assuming that Berry could prove he was denied rights under both §§ 1983 and 1985, removal is not proper on those grounds.

Furthermore, to the extent Berry may be asserting as grounds for removal any misconduct by the state judiciary or state prosecutor, these are insufficient grounds for removal under 28 U.S.C. § 1443. In order for state action to be a sufficient ground for removal under § 1443, the state officials must be acting pursuant to a state law or statute. *Rachel*, 384 U.S. at 798. The Supreme Court was held

> removal is not warranted by an assertion that a denial or rights of equality may take place and go uncorrected at trial. Removal is warranted only if it can be predicted by reference to a law of general application that the defendant will be denied or cannot enforce the specified federal rights in the state courts.

Id. at 800. A defendant's contention that he will be denied a fair trial in state court is not a sufficient ground for removal. *Sullivan v. Missouri*, 588 F.2d 579, 580 (8th Cir. 1978) (quoting *Greenwood v. Peacock*, 384 U.S. 808, 827-28 (1966)). *Accord, Powell v.*

Arkansas, 4334 F.2d 604, 605 (8th Cir. 1970). Federal courts are not to involve themselves "in the unseemly process of prejudging their brethren of the state courts." *Rachel*, 384 U.S. at 803-04. Therefore defendant Berry has not stated sufficient grounds for removal under 28 U.S.C. § 1443 and this case will be remanded to state court.

In the notice of removal Berry also relies on 28 U.S.C. § 1441(b) as a basis for removal. Although Berry makes no argument based on that section in his Memorandum in Oposition to the Motion to Remand, the Court will discuss removal under 28 U.S.C. § 1441(b) because it is cited in the notice of removal.

28 U.S.C. § 1441(b) provides for removal of "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States. . . ." 28 U.S.C. § 1441(b). 28 U.S.C. § 1441(b) "does not provide an independent basis for federal court jurisdiction, but rather merely provides for the removal to federal courts of any cases which the Court would have had original jurisdiction over." *West v. Missouri Board of Law Examiners*, 520 F. Supp. 159, 160 (E.D. Mo.), *aff'd*, 676 F.2d 702 (8th Cir. 1981).

To the extent defendant Berry may be seeking removal pursuant to 28 U.S.C. § 1441(b), removal is proper only if the case could have originally been brought in federal court based on a claim arising under federal law. The claim based on federal law must be " 'an essential element of plaintiff's cause of action' " and the claim must be clear on the face of the petition " 'unaided by the answer or petition for removal.' " *Evans v. Missouri Pacific R. Co.*, 795 F.2d 57, 58 (8th Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987) (quoting *First Nat'l Bank v. Aberdeen Nat'l Bank*, 627 F.2d 843, 849 (8th Cir. 1980)). *Accord, M. Nahas & Co. v. First Nat'l Bank of*

Hot Springs, 930 F.2d 608 (1991) (finding that jurisdiction pursuant to 28 U.S.C. § 1441(b) "exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Id.* at 611). Further, "the plaintiff is the master of h[er] claim and may avoid federal removal jurisdiction by exclusive reliance on state law." 930 F.2d at 611 (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). In this case, plaintiff's claims are based solely on state common law and therefore the case may not be removed pursuant to 28 U.S.C. § 1441(b).

Because this Court finds that removal is not proper under either 28 U.S.C. § 1441(b) or § 1443, the Court will not address the parties' timeliness arguments.

After reviewing the motion to remand, the supporting memorandum, and defendants' memorandum in opposition, the Court finds that a hearing is unnecessary to the determination of the issue before the Court. Consequently, the requests for a hearing will be denied.

As a result of the Court's decision to remand this case back to the state court, defendants' motion to consolidate will be denied to the extent it seeks consolidation with Cause No. 91-1586 C(2) and any other claim pending in this jurisdiction.

Accordingly, after careful consideration,

IT IS HEREBY ORDERED that plaintiff's motion to remand is GRANTED.

IT IS FURTHER ORDERED that the parties' requests for a hearing on the issue of remand are DENIED.

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IT IS FURTHER ORDERED that defendants' motion to consolidate is DENIED.

Any remaining motions may be considered by the appropriate state court on remand. An appropriate order shall accompany this memorandum and order.

Dated this 19th day of February, 1992.

s/ Edward L. Filippine
UNITED STATES DISTRICT JUDGE

APPENDIX D — RELEVANT CONSTITUTION AND STATUTORY PROVISIONS

Section I of the Fourteen Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The Civil Rights Removal Statute, 28 U.S.C. § 1443(1), provides:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof.

The Ku Klux Klan Act, 42 U.S.C. § 1985(3), provides in pertinent part:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any persons or class of persons of the equal protection of the laws, or of equal privileges and immunities

under the laws; . . . in any case of conspiracy set forth in this Section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his persons or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.